IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38643/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 20 January 2016	**On 11 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS IRENE SAFOA OSEI
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Mr I Richards, Senior Presenting Officer
For the Respondent/Claimant: Miss I Hussain, Counsel instructed by Rock Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Camp sitting in Birmingham on 22 December 2014) allowing on Article 8 grounds the claimant's appeal against the decision of the Secretary of State to remove the claimant and her dependent family members pursuant to Section 10 of the Immigration and Asylum Act 1999. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant or her dependent family members require anonymity for these proceedings in the Upper Tribunal.

© CROWN COPYRIGHT 2016

The Reasons for the Grant of Permission to Appeal

2. On 13 February 2015 First-tier Tribunal Judge Saffer granted permission to appeal for the following reasons:

> "I am satisfied it is arguable that the judge misapplied the balancing exercise by excluding from the balance the [claimant's] adverse immigration history and the deception practice in obtaining entry clearance referred to in paragraph 17, by placing too much emphasis on the length of time [R] had been here and her schooling."

The Decision of the First-tier Tribunal

3. For the present purposes, it was only necessary to refer to the judge's reasons for finding that the eldest child, [R], met the requirements of Rule 276ADE(1)(iv), as this finding determined the outcome of the claimant's appeal and the appeals of the other family members, including [R]'s two younger siblings who had not accrued seven years' residence in the United Kingdom.

4. The judge's reasoning on Rule 276ADE(1)(iv) are contained in paragraphs 17 to 21 of his decision, which I reproduce verbatim below:

> "17. The immigration histories for the appellant and her husband show a deliberate disregard for the immigration rules of the United Kingdom. Her husband arrived in March 2004 with a visit visa. The appellant joined him in November 2004, also with a visit visa. They deliberately overstayed. I am satisfied that they had no intention of returning to Ghana when they arrived in the United Kingdom. The evidence strongly suggests that the appellant's motivation was to seek medical help for her diabetes, to which she attributes her previous miscarriages. She became pregnant soon after her arrival in the United Kingdom. The child born as a result was followed by two more children, born when their parents had no right to be in the United Kingdom and were well aware of this.
>
> 18. The eldest child [R] is in a different situation from her two sisters. She is now nine years old. She was born in the United Kingdom and has never left the country. The respondent appears to accept that she fulfils all the criteria required by paragraph 276ADE of the immigration rules, except that it would be reasonable to expect her to leave the United Kingdom (276ADE(1)(iv)). As Miss Hussain submitted, she would have fulfilled the relevant criteria before the changes made in December 2012. The evidence is that, like her sisters, she has little knowledge of Ghana and does not speak Twi.
>
> 19. I bear in mind Azimi-Moayed v Secretary of State for the Home Department [2013] UKUT 197 (IAC) and, in particular, the opinion expressed in it that the seven years from age four are likely to be more significant that the first seven years of life. Five of [R]'s years in the United Kingdom have been passed since the age of four. I also bear in mind EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) for the proposition summarised in the headnote that '[i]n the absence of countervailing factors, residence of over 7 years with children well-integrated into the educational system in the United Kingdom, is an

indicator that the welfare of the child favours regularisation of the status of mother and children'.

20. The evidence, which I accept, is that [R] and her next youngest sister are integrated into the educational system in the United Kingdom. The youngest is only four.

21. I do not, for these reasons, consider that it is reasonable to expect the eldest child, [R], to leave the United Kingdom. It follows that I find that she has satisfied me on a balance of probabilities that she meets the requirements of paragraph 276ADE."

The Application for Permission to Appeal

5. The Secretary of State applied for permission to appeal on the ground that the judge erred in law by failing to consider the immigration status of the parents when assessing whether it is reasonable for the eldest child to leave the UK for the purposes of Rule 276ADE(1)(iv). The finding was thus erroneous, and the error also undermined the Article 8 findings in favour of the remaining claimants. In support of this proposition, the Secretary of State cited paragraphs [36] and [37] of the judgment of Clark LJ in **EV (Philippines) [2014] EWCA Civ 874** and paragraphs [58] to [60] of the judgment of Lewison LJ in the same case.

6. Applying the reasoning of the Court of Appeal in **EV (Philippines)**, the Secretary of State contended that the parents had no right to remain in the UK independently of their child, and the most important consideration in the assessment of the children's best interests was that of allowing the children to be brought up by their parents. Given that this could take place in either the UK or in Ghana, the court ought to have considered the parents' immigration status as a factor rendering it reasonable to expect the children, including [R], to leave the UK.

Reasons for Finding an Error of Law

7. I refer to the passages from **EV (Philippines)** cited in the application for permission to appeal.

8. **EV (Philippines) v SSHD [2014] EWCA Civ 874** provides the most recent guidance from the senior courts on the interrelationship between the best interests of children and the question whether it is reasonable to expect a child to return to the country of his or her parent's country of origin. Clarke LJ said:

"34 In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have

become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

9. Lewison LJ said:

"49. Second, as Christopher Clarke LJ points out, the evaluation of the best interests of children in immigration cases is problematic. In the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to piggyback on their rights. In the present case, as there is no doubt in many others, the Immigration Judge made two findings about the children's best interests:

(a) the best interests of the children are obviously to remain with their parents; [29] and

(b) it is in the best interests of the children that their education in the UK [is] not to be disrupted [53].

50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the Immigration Judge's findings about the best interests of the children point towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question the Tribunal has to decide. Or is there is a middle ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?"

10. The judge went on to analyse **<u>ZH (Tanzania) v Secretary of State for the Home Department</u> [2011] UKSC** 4 in order to elicit an answer to this question. He reached the following conclusion:

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis the facts are as they are in the real

> world. One parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

On the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens. That was a long way from the facts of the case before them. No one in the family was a British citizen. None had the right to remain in the country. If the mother was removed, the father had no independent right to remain. With the parents removed, then it was entirely reasonable to expect the children to go with them:

> "Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

Jackson LJ agreed with both judgments.

11. For the reasons given in the grounds of appeal to the Upper Tribunal, and the additional reasons ventilated in the grant of permission, an error of law is clearly made out. The judge had a choice. He could either have followed the real world approach championed by Lewison LJ, or he could have followed the conventional hypothetical approach comprehensively set out by Clarke LJ (assessment of best interests for and against removal *without immigration control overtones*, followed by assessment of wider proportionality considerations). He did neither. Instead, he performed an inadequate best interest assessment, whereby he only took into account the best interest considerations which militated in favour of the eldest child remaining here, and did not take into account the best interest considerations which militated in favour of her returning to Ghana with the other members of her family. The judge also did not bring to bear wider proportionality considerations (see in particular Clarke LJ at paragraph [37] cited above) before reaching the conclusion that requiring the eldest child to return to Ghana was unreasonable.

12. Accordingly, the decision of the First-tier Tribunal must be set aside and remade.

Future Disposal

13. In the normal course of events, the Upper Tribunal will retain a case such as this, and indeed seek to remake the decision on the evidence before the First-tier Tribunal and without the need for a further hearing. However, the First-tier Tribunal did not make any finding on the claimant's evidence as to the asserted difficulties which the family would face on return to Ghana, and equally it did not engage with the case advanced by

the Secretary of State that there were no significant obstacles to the claimant and her family re-establishing themselves in Ghana.

14. With the agreement of the parties, I find that this is therefore an appropriate case for remittal to the First-tier Tribunal for a fresh hearing. None of the findings made by the First-tier Tribunal shall be preserved, save for the wholly uncontentious findings made in paragraph [17].

Notice of Decision

15. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside.

Directions

16. The appeals shall be remitted to the First-tier Tribunal in Birmingham for a *de novo* hearing before any judge apart from Judge Camp.

17. None of the findings of fact made by the First-tier Tribunal shall be formally preserved, save the findings made in paragraph [17] of Judge Camp's decision.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson